A DEFECT IN THE MASSACHUSETTS PROBATE SYSTEM.

UNDER the statutes and practice of Massachusetts an administrator of an intestate estate who has collected the personal property and paid the debts of the deceased petitions the probate court having jurisdiction over the estate to make an order directing the distribution of the surplus remaining in his hands among those entitled thereto as next of kin. The petition sets forth that there is a balance to be distributed, and gives the names and residences of all persons known to the administrator who are supposed or claim to be entitled to the estate under the statutes of distribution. Upon the filing of this petition the court orders notice to all persons interested in the estate, by requiring the petitioner to publish a citation at stated intervals before the hearing. At the hearing the court passes upon all questions of law and fact involved in the distribution of the estate.[1] All persons having claims have an opportunity to come in and have them heard and adjudicated. The decree which the court renders determines who are in fact the persons entitled to the estate as next of kin, and orders distribution to them by name.[2] If no appeal is taken within thirty days from the date of the decree, it becomes final and conclusive, unless it can be shown that the administrator was guilty of fraud or gross error.[3] After he has distributed the property in compliance with the decree of distribution, the administrator files an account showing such distribution; upon proof of the truth of the account, the court allows it, and the administrator receives a final discharge. The statute[4] enacts that "such discharge shall forever

[1] Loring *v.* Steinman, 1 Metcalf, 204; Muldoon *v.* Muldoon, 133 Mass. 111. In Loring *v.* Steinman, Shaw, C. J., said: "The decree of distributions involves the necessity of inquiry into questions of fact; . . . and in deciding these questions of fact the probate court must be governed by those rules of evidence and those presumptions of fact from circumstances which are resorted to by all other tribunals in determining questions of fact." In Muldoon *v.* Muldoon, Field, J., said: "In so far as he holds the proceeds simply as administrator, the question of their distribution is for the determination of the probate court, and any legal questions involved can come before this court on appeal."

[2] Loring *v.* Steinman, 1 Metcalf, 204.

[3] Public Statutes, chap. 156, section 7; Davis *v.* Cowdin, 20 Pick. 510.

[4] Public Statutes, chap. 144, section 12.

exonerate the party and his sureties from all liability under such decree, unless his account is impeached for fraud or manifest error."

This is in brief the regular method by which an administrator settles an intestate estate. The procedure is simple and complete. The administrator who has acted with ordinary care and in good faith obtains a complete discharge from all liability in respect to the settlement of the estate. If it appears subsequently that the property has been given over to the wrong persons, the administrator, who has acted under a decree of distribution, is protected. He has obeyed an order of a court of competent jurisdiction, and, in the absence of fraud or gross error on his part, he cannot be held responsible if the decree of the court is erroneous in point of fact. In the language of Chief Justice Shaw in the leading case of Loring *v.* Steinman,[1] "the possibility of falling into mistake cannot deter the court from acting, and when all the means of ascertaining the truth are exhausted, cannot prevent the judgment from being at least so far conclusive as to protect all those who are compelled to act under it and to abide by its final adjudication." It is no answer to the administrator's claim of immunity under the decree of distribution to say that the plaintiff never knew of the death of the intestate, nor of the proceedings upon the decree. The distribution of an intestate estate is said to be analogous to a proceeding *in rem*, where the court has jurisdiction over the subject-matter absolutely, and where persons are concerned incidentally only according to their respective rights and interests, and where the court, in determining who are entitled to the property, settles the question definitely in regard to all persons interested, whether they have actual notice of the proceedings or not.[2] The law may require notice to the next of kin, but it has always been held that constructive notice may be adequate.[3]

The defect in the Massachusetts probate system which it is the purpose of this article to point out is that it fails to provide any method by which an executor can secure the same protection that a decree of distribution gives to an administrator. In order to see clearly that this defect exists, it will be necessary to examine closely the practice of decrees of distribution in the case of administrators, and to ascertain on what basis it rests.

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[1] 1 Metcalf, 204.

[2] Loring *v.* Steinman, 1 Metcalf, 204; Pierce *v.* Prescott, 128 Mass. 144.

[3] Loring *v.* Steinman, 1 Metcalf, 204.

This procedure is not based upon any explicit statutory provision. There is no enactment that an administrator shall obtain a decree of distribution, and there is no express authority given to the probate court to make such a decree. One of the conditions of the bond which an administrator is required by statute to give is that he shall pay to such persons as the court may direct the balance remaining in his hands upon the settlement of his accounts;[1] this, says the court, "contemplates that an administrator is entitled to be protected by a decree of distribution, passed by the probate court, before he can be called upon to divide the balance remaining in his hands among those claiming it as distributees under the statutes."[2] Upon this implication of the statute prescribing the conditions of the administrator's bond is based the right of the administrator to obtain and the authority of the probate court to make a decree of distribution. No other source of the jurisdiction exercised has been pointed out in any of the reported cases. The practice has existed for many years, however, has been embodied in the rules governing the procedure of probate courts,[3] and may be taken to be firmly established in this State.

It is not laid down anywhere that an administrator *shall* obtain a decree of distribution before distributing the estate, except so far as distribution without such a decree might be a breach of his bond. But, on the other hand, it seems to be the only mode in which an administrator can secure protection against the future claim of an unknown heir. It has been suggested, and there is some authority to support it, that the allowance of a final account showing items of distribution is in effect a decree of distribution as to such items, and affords the administrator the same protection. In Emery *v.* Batchelder,[4] Morton, C. J., said: "The allowance of the final account in which the defendants credited themselves with the residue in their hands as paid to the executors in Maine was in effect an order of the court that such residue should be transmitted to the defendants as principal executors appointed in Maine. If the executors in the two States had been different persons, it is clear that the executors here could not be held accountable in our courts after they had, under an order of the probate court, transmitted the balance in their hands to the executors in Maine. They

[1] Public Statutes, chap. 130, section 2, par. 4.
[2] Morton, J., in Cathaway *v.* Bowles, 136 Mass. p. 55.
[3] Fuller's Massachusetts Probate Law, 136.
[4] 132 Mass. 452.

then would have fully administered the estate here." On the other hand, the court in the case of Granger *v.* Bassett,[1] speaking through Justice Wells, said: "The probate court had no authority over the distribution of the residuary legacies. The relative rights of the legatees, and other questions affecting such distribution, cannot properly be heard upon the settlement of the executor's account. For the same reason, the executor should not be allowed for their payment in his account, as the effect of such allowance, if any effect can be given to it, would be to prejudice the rights of those who should claim a larger share than had been paid them. The settlement of the account should determine the amount of the residue subject to distribution, but not the rights or shares of those who are entitled."

By thus holding that items of distribution of the balance of the estate are not properly to be included in an account, the court, in effect, decided that the allowance of an account could not amount to a decree of distribution as to such items. But whatever doubt there may have been on the subject is set at rest by the decision of the Supreme Court rendered in January, 1892, in the case of Defriez *v.* Coffin.[2] In that case, to quote from the opinion, "Without a decree of distribution the administrator paid over to certain persons whom he supposed to be the heirs of the testator the residue of the estate in his hands after payment of debts and various charges and expenses. It turned out about a year after that they were not the heirs, and that the daughter for whose benefit this suit was brought was the sole heir. Shortly after the distribution, and before he knew of the daughter, the administrator presented to the probate court an account, in which he credited himself with the amount paid to the supposed heirs. This was allowed by the probate court. But it is clear that the action of the probate court in allowing it did not legalize the payments to the supposed heirs. Whatever might have been the result had the distribution been made in good faith under the decree of the probate court, the estate is still in his hands, and has not been fully administered." Here is a direct decision that the allowance of an account will not afford the protection of a decree of distribution. The court cites the case of Granger *v.* Bassett, quoted above, and the inference is that the decision is based upon the ground that items of distri-

[1] 98 Mass. 462. [2] 155 Mass. 203.

bution are not properly a part of an account. It is true that in Defriez *v.* Coffin it was an administrator with the will annexed who was acting in the settlement of the estate; but the court apparently overlooked this, and treated the case as if it had been an administrator of an intestate estate. If the decision is rested upon the ground stated above, this fact is not material.

Section 14 of chapter 144 of the Public Statutes, as amended by Acts of 1889, chapter 466, section 2, reads as follows: —

"The decree of the court having jurisdiction, allowing an account of an executor, administrator, trustee, or guardian, shall, except in cases of fraudulent concealment or fraudulent misrepresentation on the part of the accountant, be final and conclusive against all persons interested in such account, and legally competent at the date of such decree, . . . and against all other persons who are or may become interested therein, although unborn, unascertained, or legally incompetent to act in their own behalf, if their guardian *ad litem* or next friend has, after having been duly qualified, assented to such account, or been heard thereon."

It might have been argued that the effect of this statute was to make the allowance of an account equivalent to a decree of distribution. But in so far as items of distribution are concerned, this statute cannot have that effect, because, according to Defriez *v.* Coffin and Granger *v.* Bassett, items of distribution are not properly a part of an account, and the statute cannot be construed as extending to items improperly included in the account allowed.

So far this discussion has dealt only with the administrator of an intestate estate; the defect which seems to the writer to exist in the Massachusetts probate system has reference to an executor, or to an administrator with the will annexed, who is to all intents and purposes in the same position. But in order to approach the question properly, it was necessary to examine briefly the subject of decrees of distribution.[1]

It seems to be universally admitted that an executor is not

[1] The term "decree of distribution," as ordinarily used, applies to the order of the court directing the distribution of an intestate estate among those entitled to a distributive share under the statutes of distribution. But an executor also *distributes* the estate of his testator. The distribution in his case is determined by the will instead of by the statutes, as in the case of the administrator. A decree of distribution applied to an executor would be an order of the court directing the distribution of a testate estate among those entitled to a distributive share under the will of the testator. It is in this sense that the term is used in this article when applied to an executor. Such a decree would have the same effect in protecting the executor, and to the same extent as a similar decree protects an administrator.

entitled to obtain a decree of distribution from the probate court. No statute can be found authorizing the probate court to make such a decree upon the petition of an executor. There is no condition in the executor's bond from which it can be argued that a decree of distribution "is contemplated." While the administrator is bound to pay "to such persons as the court may direct the balance remaining in his hands,"[1] the executor gives bond "to administer according to law and to the will of the testator all his personal estate which may come to his possession."[2] There is hardly enough ground in this provision from which the court can "contemplate" a decree of distribution. By section 12 of chapter 144 of the Public Statutes it is provided that "when *an executor*, administrator, guardian, or trustee has paid or delivered over to the persons entitled thereto the money or other property in his hands *as required by a decree of the probate court*, he may perpetuate the evidence thereof by presenting to said court within one year after the decree is made an account of such payments or of the delivery over of such property." It might be suggested that this statute "contemplated" that an executor was to be entitled to obtain the decree mentioned in it. But the Supreme Court has never so decided.[3] On the contrary it held in the case of Cowdin *v.* Perry,[4] that the probate court has no jurisdiction to order the payment of legacies to particular persons. The facts of that case were as follows: A testator bequeathed property to his grandchildren to be equally divided between them, provided that if any grandson should die before arriving at the age of twenty-one years, the share of the one so dying should be divided equally among the surviving ones. The executor paid the share of a grandson who was under twenty-one years of age to his guardian. An account was subsequently filed in which the executor credited himself with the amount so paid to the guardian. This account was allowed by the probate court upon notice given to all the other legatees interested under the will. The minor grandchild died under age, and one of the other grand-

[1] Public Statutes, chapter 130, section 2, paragraph 4.

[2] Public Statutes, chapter 129, section 5, paragraph 2.

[3] There are other statutory provisions which seem to indicate that the framers supposed that an executor could obtain a decree of distribution. For example, Public Statutes, chapter 143, section 12, enacts as follows: "Such suit [upon the bond] may be brought by a person who is next of kin to recover his share of the personal estate after a decree of the probate court ascertaining the amount due to him, if the *executor* or administrator neglects to pay such amount when demanded."

[4] 11 Pick. 503.

sons brought action against the executor for a share of the legacy paid over to the guardian. It was held that the legacy was contingent upon the grandsons attaining the age of twenty-one years; that it was the duty of the executor to retain it in his hands until the legatee's attainment of that age or his death; and that the settlement of the account containing the credit of the payment of the legacy to the guardian of the minor did not discharge the executor from liability. The case might have been decided without passing upon the power of the probate court to make a decree of distribution on petition of an executor upon the ground that items of distribution of legacies are not properly included in an account. But the court did not take this ground, resting their decision squarely on the want of power in the probate court to order the payment of a legacy, without reference to the question whether or not the allowance of the account amounted to such an order. This is what was said by Chief Justice Shaw, who delivered the opinion:—

"But the question to whom and at what time a legacy or distributive portion under a will is to be paid by an executor is one of which the probate court has no jurisdiction. Any decree directing the executor to pay or not to pay a legacy to any particular person, whether upon or without notice, would be extra-judicial, and would afford the executor no justification. It would in this respect be similar to a decree directing payment of a debt, and as such a mere nullity."

The case of Cowdin *v.* Perry was decided in 1831. If the probate court had no jurisdiction to make a decree of distribution in the case of an executor in 1831, no statute since has conferred it. The statutes[1] give the probate court jurisdiction of all matters relating to the estates of deceased persons. It cannot be said that this gives the court jurisdiction to grant a decree of distribution to an executor. A statute of almost exactly the same terms[2] was in force in 1831, when the case of Cowdin *v.* Perry was decided, and when it was held that to order the payment of legacies was beyond the jurisdiction of the probate court. The statute of 1891,[3] which gave the probate court full equity jurisdiction of all matters relating to the administration of the estates of deceased persons, and of wills, conferred upon the court such general chancery powers as had been

[1] Public Statutes, chapter 156, section 2.
[2] Revised Statutes, chapter 83, section 6.
[3] Acts, 1891, chapter 415.

previously vested in our courts of equity.[1] But the granting of decrees of distribution to executors has never been within the jurisdiction of courts of equity. There seems to be a fundamental distinction between the jurisdiction of the probate court over testate and intestate estates. While the distribution of the latter to the next of kin by the administrator is said to be a matter "wholly and peculiarly within the jurisdiction of the probate court, exercising in this respect the jurisdiction of the ecclesiastical courts,"[2] the distribution of the former by the executor to the legatees is held to be wholly beyond the jurisdiction of the court. This distinction may be the basis for extending the powers of the court by "contemplation" in the case of an administrator, and not in that of an executor.

That an executor has need of the protection which a decree of distribution gives an administrator is of course apparent. In the case of every legacy, specific as well as residuary, to individuals named as well as to a class, the fact of identity of the legatees must be established and decided by some one. If the legacy is to the heirs of the testator, it must be determined who are the heirs, whether children, or brothers and sisters, or more remote relatives. If the bequest is to first-cousins, for instance, it must be settled how many first-cousins there are. If property is given by the will to the eldest son of John Brown, the question Who is the eldest son? must be answered. And when it is simply a specific bequest to John Brown, there is a fact involved which must be determined. It is unnecessary to suggest some of the situations in which an executor, who has acted in good faith and with all possible care, may find that he has paid the legacy to the wrong person; they are too evident. A very good illustration of an extreme case of apparently unavoidable mistake of fact may be found in the reports of the cases of Defriez *v.* Coffin and Shores *v.* Hooper.[3] If there

[1] The statute 1883, chapter 223, conferred upon the Superior Court equity jurisdiction. The words of the statute are: "Original and concurrent jurisdiction with the Supreme Judicial Court in all matters in which relief or discovery in equity is sought." It was held in Baldwin *v.* Abraham, 140 Mass. 459, that this only conferred such equity jurisdiction as was vested in the Supreme Court as a court of general equity jurisdiction. The extent of the jurisdiction conferred by the statute of 1891 must have the same limits.

[2] Loring *v.* Steinman, 1 Metcalf, 204.

[3] 155 Mass. 203; 153 Mass. 228. These two cases arose from a mistake in fact as to who were the heirs of the testator, entitled under his will to the residue of his estate. The testator had been a resident of Nantucket from 1862 until his death in 1884. He was never known by the community nor by his family to have married. His sisters were supposed to be his heirs, and the residuary estate was divided among them. It

is any reason for protecting the administrator from liability arising from mistakes of fact, the same reason exists in the case of an executor.

It remains to be considered whether an executor can obtain the necessary protection in some other way than by a decree of distribution. The usual method in which testate estates have been wound up is by the filing of an executor's final account showing payments of legacies as well as all other expenditures. Upon the allowance of such final account by the probate court the executor has considered his liability at an end. But is it? The cases of Granger *v.* Bassett and Defriez *v.* Coffin have decided that payments of residuary legacies are not proper items of an account, and that an allowance of an account showing such payments will afford no protection to the accountant. To be sure, all persons who sign the account as consenting to it can be estopped from objecting to it thereafter, and the account, including items of distribution, can be properly allowed for this purpose. But this does not cover the real difficulty,—the unexpected appearance of some person unknown to the executor who is entitled to the residuary legacy, and who, *ex hypothesi*, has not consented to the account. The allowance of the account cannot affect him.

If items of payment of residuary legacies have no place in an account, is the same true of payments of specific legacies? What distinction can be drawn? But apart from this, if it is true that the probate court has no jurisdiction to order the payment of a specific legacy, it is clear that the allowance of an account showing such payment cannot protect the executor. The theory upon which exemption from further liability is claimed is that the court, by allowing the account, has decreed that the executor has paid the right amount to the right person. But such a decree in the case of a specific as well as residuary legacy, according to the opinion of the court in Cowdin *v.* Perry, would be beyond the jurisdiction of the probate court. As was said by Chief Justice Shaw in

was discovered subsequently that he had been married in Alabama in 1860, and had had a child, a daughter, born in 1861. He had deserted his wife and child in 1861, taking with him what little property his wife had. The wife had moved to Tennessee, where she had died soon after, in utter poverty, leaving the child dependent on the charity of neighbors. The daughter was found among the moonshiners of the Tennessee mountains in 1888. These facts were proved before the court, and the daughter was declared entitled to the property, which had been given over to the sisters. The story of this case, as it appears in the depositions of the witnesses, presents a romance which can hardly be surpassed in fiction.

that case, "the object of such accounting by the executor before the judge is to show that he has paid according to his charges; and upon producing proof of the fact of payment, such charge is allowed. But whether such payment is rightful is a question for which the executor himself stands responsible."[1] The section of chapter 144 of the Public Statutes in regard to the allowance of accounts has been referred to above,[2] in considering the effect of the allowance of administrator's accounts. What was said in that connection is equally applicable to the case of an executor. If the statute does not operate to make the allowance of an administrator's account final and conclusive as to the fact of payment of distributive shares to the proper persons, it cannot have that effect upon the allowance of an executor's account.

If the allowance of an account cannot protect an executor who has paid a specific or residuary legacy to the wrong person, is there any other method by which the desired result can be attained? It may be suggested that the executor can refuse to pay the legacy to the supposed proper legatee until the latter brings action and establishes the fact before a jury that he is entitled to the legacy. But if the executor pursues this course simply for the purpose of protecting himself, and not from any real doubt as to the rightfulness of the plaintiff's claim to the legacy, it may fail to afford him any security. If the plaintiff recovers a judgment he gets a separate judgment for costs against the executor personally.[3] Whether the executor can reimburse himself from the estate will depend upon the decision of the judge of probate as to the propriety of the suit. And, further, if the real legatee should turn up subsequently, and bring action for the legacy, the executor would have no defence. The action to recover a legacy is an action of contract.[4] What the plaintiff obtains, if he is successful, is a judgment at law. The court of law cannot make a decree ordering the payment of the legacy. After judgment the executor does not pay the legacy under a decree of the court, but the plaintiff satisfies his judgment out of the estate of the testator. The fact that one jury found the first plaintiff entitled could not prevent a second jury from finding in favor of the second plaintiff. Only the parties to the first suit would be concluded by the verdict and judgment. If

[1] 11 Pick. 503.
[2] *Ante*, page 36.
[3] Public Statutes, chapter 166, sections 6 and 7; Perkins *v.* Fellows, 136 Mass. 294.
[4] Public Statutes, chapter 136, section 19.

at the time of the second suit the executor had no assets of the testator in his hands, the plaintiff's judgment for the legacy running against the executor in his official capacity would be of little value; but the executor would have to pay the costs of the second suit out of his own pocket, and would find considerable difficulty in reimbursing himself. And in addition to that, the finding of the second jury would prove that the executor had violated his bond, and if the plaintiff could obtain the consent of the judge of probate,[1] the bond might be enforced against the executor. Whether or not the judge of probate would allow a suit upon the bond might depend upon the character of the first suit for the legacy. It will be seen from this very brief and superficial discussion that the executor will come very far from securing the necessary protection by pursuing the method suggested.

If two or more persons claimed the same legacy, it would be open to the executor to file a bill of interpleader, and have the court decide which of the two was entitled. But this would not prevent a third person from proving subsequently that he, and neither of the other two, was the legatee named in the will; he would not have been a party to the interpleader suit, and would not have been bound by the decree. A bill of interpleader is within the equity jurisdiction of the court, and a court of equity has the power in some cases to bind by its decree persons named as parties who are out of the jurisdiction. When the subject-matter is within the jurisdiction, and there are other parties before the court, so that the cause can be decided on its merits, and an effectual decree made, the court will proceed, and the rights and interests of the absent parties who have been given constructive notice in compliance with the order of the court, will be bound and concluded by the decree.[2] But the court of equity, having the subject-matter within its jurisdiction, could not make a decree *in rem* binding all the world. Its decree would only settle the rights of those parties who were named as such, whether they appeared or not. It could not bind parties unknown who are not named, and to whom no notice, actual or constructive, is given. A bill of interpleader would, then, secure no greater protection to the executor than would an action at law. On doubtful questions of law the executor may maintain a bill for instructions; but this will not decide questions of fact, nor bind unknown heirs.

[1] Public Statutes, chapter 143, sections 10–13; Newcomb *v.* Williams, 9 Metcalf, 525.

[2] Spurr *v.* Scoville, 3 Cush. 578.

The conclusion reached by this investigation is that our probate system provides no method by which an executor in distributing the estate of his testator can protect himself from liability to unknown legatees. It is unnecessary to consider what means are open to an executor to shift the loss after it has fallen. The purpose of this article has been to show simply that the liability cannot be escaped. It would not be a difficult matter to show that whatever remedies the executor may have to shift the burden fails to give him adequate protection. The fact that the executor must shoulder the liability seems to be a defect in our probate system, which is not remedied by the fact that there is a possibility that the ultimate loss may be transferred to another. There is no reason why an executor should be forced to assume this extreme liability. As the law stands, he has practically the responsibility of an insurer. He must find the person entitled at his peril. Good faith and the highest possible degree of care are no defence if the legacy has been paid to the wrong person. His liability is of the exceptionally strict class to which belongs that of common carriers and innkeepers. The situation does not call for any such liability. There is no reason why an executor should be in any different position in this respect than an administrator; good faith and due care are all that reasonably can be required of him. No testator could conscientiously demand such responsibility on the part of the man whom he has chosen to distribute his estate. The present situation seems the result of oversight, and not of intention. Few executors have realized what the extent of their liability has been. Thousands of final accounts have been rendered and allowed, and have been supposed to terminate the liability of the executor. But if the conclusions of this article are correct, the liability will run on forever, not terminated even by a Statute of Limitations.[1] Until the Legislature steps in and remedies this defect, it may be said that once an executor, always an executor.

Oliver Prescott, Jr.

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1 "Is this right of action [to recover a legacy] lost by delay in bringing the same? Clearly not by the general statutes limiting the period for bringing actions, as legacies are not within them, they being held to partake so far of the nature of a trust, or demand of an equitable character, as not to be embraced therein." — DEWEY, J., in *Brooks* v. *Lynde*, 7 Allen, 64.